
DEPARTMENT OF TRANSPORTATION**Office of the Secretary****49 CFR Part 40**

[OST Docket No. OST-99-5742; Notice 99-41]

RIN 2105-AC78 05F-99-5742-1

Drug and Alcohol Testing Procedures

AGENCY: Office of the Secretary, DOT.

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: This advance notice solicits public comments on a proposed procedure that organizations certifying substance abuse professionals (SAPs) could use to have members included in the Department of Transportation's substance abuse professional (SAP) definition. The Department proposes to require such organizations to obtain a National Commission for Certifying Agencies (NCCA) accreditation as a prerequisite for having the DOT review their petitions for inclusion of their members as SAPs in the Department's drug and alcohol testing program.

DATES: Comments should be submitted on or before August 2, 1999. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Written comments should be sent to Docket Clerk, Att: Docket No. OST-99-5742, Department of Transportation, 400 7th Street, SW., Room PL401, Washington DC 20590.

For the convenience of persons wishing to review the docket, it is requested that comments be sent in triplicate. Persons wishing their comments to be acknowledged should enclose a stamped, self-addressed postcard with their comment. The docket clerk will date stamp the postcard and return it to the sender. Comments may be reviewed at the above address from 9:00 a.m. through 5:30 p.m. Monday through Friday.

Commenters may also submit their comments electronically. Instructions for electronic submission may be found at the following web address: <http://dmses.dot.gov/submit/>. The public may also review docketed comments electronically. The following web address provides instructions and access to the DOT electronic docket: <http://dms.dot.gov/search/>.

FOR FURTHER INFORMATION CONTACT: Jim L. Swart, Policy Advisor, Office of Drug and Alcohol Policy and Compliance, Room 5405, (202) 366-3784; 400 7th Street, SW., Washington DC 20590.

SUPPLEMENTARY INFORMATION:

Background

The Omnibus Transportation Employees Testing Act of 1991 required that an opportunity for treatment be made available to covered employees. To implement this requirement in its alcohol and drug testing rules issued in February 1994, the Department of Transportation (DOT) established the role of "substance abuse professional" (SAP). The DOT rules require an employer to advise a covered employee who engages in conduct prohibited under these rules of the resources available for evaluation and treatment of substance abuse problems. Employers wishing to return an employee to safety-sensitive duties following a rule violation must first ensure that the employee has been evaluated by a SAP.

The SAP plays a pivotal role in the evaluation, referral, and treatment process of a safety sensitive employee who has violated the DOT regulations. The SAP is charged with the responsibility for making a face-to-face initial assessment and evaluation to determine what assistance, if any, is needed to address the employee's substance abuse problem. If assistance is needed, the SAP is responsible for referring the employee to the appropriate education or treatment program.

The SAP is also charged with conducting a face-to-face follow-up evaluation to determine if the employee has demonstrated successful compliance with the initial assessment

and treatment recommendations. In addition, the SAP is responsible for providing the employer with a follow-up drug and/or alcohol testing plan for the employee. Based on these responsibilities, a SAP plays a major role within the testing program in managing the therapeutic decisions when the regulations are violated.

Individuals who are currently qualified to act as a SAP in the DOT drug and alcohol testing program are defined in 49 CFR 40.3 as follows:

Substance abuse professional. A licensed physician (Medical Doctor or Doctor of Osteopathy); or a licensed or certified psychologist, social worker, or employee assistance professional; or an addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission or by the International Certification Reciprocity Consortium/Alcohol & Other Drug Abuse). All must have knowledge of and clinical experience in the diagnosis and treatment of alcohol and controlled substances-related disorders.

This proposed policy focuses on considerations related to the certification of addiction counselors to act as a SAP. The National Association of Alcoholism and Drug Abuse Counselors (NAADAC) was named in the February 1994 regulations as the only organization that could certify an addiction counselor to act as a SAP. Subsequent to those rules being published, the International Certification Reciprocity Consortium (ICRC) formally requested to have their certified counselors included in the SAP definition. The review of that petition was performed by the DOT Office of Drug and Alcohol Policy and Compliance (ODAPC).

Since a major objective of the certification process in this program is the protection of the public by ensuring that only competent professionals are permitted to serve as SAPs, the review was conducted in considerable depth. It involved numerous interviews with the principals of ICRC, their technical consultants, and the acquisition of materials that thoroughly documented their certification process. It also involved interviews with the principals of NAADAC and their associated technical professionals. The review process mapped out by the Department has twelve established evaluation standards that are provided to all certification agencies seeking inclusion in the SAP definition. The review includes a detailed assessment of test development and testing processes and an examination of the data derived from the application of their certification test over time. Following this review, the

Department added the ICRC certified counselors to the SAP definition on July 17, 1996. However, the review and approval process was seen as being overly long and costly.

Subsequent to the inclusion of ICRC counselors into the SAP definition, other organizations petitioned to have their certified counselors included. This development, along with the anticipation that more organizations would petition for inclusion, caused concern that the broad regulatory oversight function at ODAPC would be disrupted. The experience involving ICRC as well as the subsequent petitioners has shown that not only is the process too protracted and costly but that the ODAPC could not effectively and efficiently examine more than one petitioning organization at a time. Provisions for the conduct of a review and approval process in ODAPC were not included in the initial promulgation of the regulations. Therefore, it was determined that a more efficient solution to the review process should be sought. We believe it is desirable that the process should enable the Department to continue portion of the review process while turning over the review's more costly, time-consuming, and technical expertise-driven elements to another entity.

We believe that an effective framework can be found in the standards used by the National Commission for Certifying Agencies (NCCA). The NCCA was created in 1989 by the National Organization for Competency Assurance (NOCA) as a commission to establish national voluntary standards and recognize compliance with these standards by agencies certifying individuals in a wide range of professions and occupations. The NCCA replaced the National Commission for Health Certifying Agencies (NCHCA), which was established in 1977 to develop criteria and standards for health certifying agencies.

The federal government played a lead role in bringing the NCHCA into being as a voluntary national organization that would serve as a platform for the development of standards of excellence in private certification. The NCCA accredits certification entities that are national in scope using standards developed originally by NCHCA in early 1978 with seed money provided by the U.S. Department of Health and Human Services under the sponsorship of then-Secretary Joseph Califano. NCCA standards were subsequently validated through research conducted by national task forces in 1980, 1981, and 1982. The standards have been updated through a

careful review process, and NCCA has been active in accrediting a variety of certification programs. The NCCA continues the mission and expands the commission's sphere of influence to include a wider range of professions and occupations.

The NOCA is a membership organization open to a variety of organizations that are interested in competency assurance issues. Membership in NOCA does not require or involve any review of certification activity. It should also be noted that NOCA membership does not involve any recognition or a discipline or profession or their certification arrangements. The NCCA is the accreditation body of NOCA. A certifying organization can be accredited by NCCA if it demonstrates compliance with applicable accreditation standards. Only those organizations that achieve NCCA accreditation recognition are allowed to display the NOCA logo on their promotional literature.

NCCA standards for accreditations are standards for voluntary certification organizations. The standards have been developed after years of research and implementation into the operation of certification organizations. They are nationally recognized principles utilized by a variety of certification organizations for certification programs in diverse professions and occupations. Accreditation by the Commission indicates that the certification organization has been evaluated by the Commission and found to meet or exceed all of its established standards.

NCCA accreditation standards are the only national and voluntary standards for certification agencies. The organizationally relevant aspects of the standards are widely respected as the most rigorous and objective benchmark by which certifying entities can gauge the quality and defensibility of their activities. The NCCA psychometric standards are consistent with the requirements set forth by the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education, as well as those requirements established by the U.S. Equal Employment Opportunity Commission.

As a voluntary, non-profit commission, NCCA is made up of elected and appointed representatives from certifying agencies and other individuals with expertise pertinent to its activity, including a public member and two psychometricians. The accreditation process includes an intensive review of certification entity documents and examination material

(i.e., validation studies, reports, and etc.) used in the agency's certification activity. Once achieved, accreditation is maintained through an annual reporting cycle and reapplication every five years. In addition to its accreditation activity, NCCA has published documents such as Guidelines for Non-Written Examinations to inform certifying entities more completely about quality certification.

In addition to the specific standards which all certification programs must meet in order to be accredited by NCCA, certain eligibility requirements must be met before a certification program can apply for review by NCCA. The program must be non-governmental (unless the certification is for government employees); national in scope; operated by a not-for-profit agency; and must have administered at least two national examinations. The Commission document, "Standards for Accreditation of National Certification Organizations" can be obtained by writing to the following address: National Commission for Certifying Agencies, 1200 19th Street, NW., Suite 300, Washington DC 20036-2422. This document outlines NCCA certification standards.

All applicants undergo a thorough evaluation of written materials submitted describing the structure of the agency and the process used to measure competency. The Commission is interested in many aspects of the applicant's certification program but it does not evaluate the examination's content and no on-site visits are scheduled as part of the review.

The Commission reviews applications for accreditation at any one of its meetings which are usually held three times during the year. When a certification agency is accredited by the NCCA, the organization is placed on an accreditation list and the agency is permitted to include the NCCA logo on its brochures and printed material.

Organizations seeking SAP accreditation with the Department through the NCCA mechanism would have to pay certain fees. All organizations with Commission accreditation must pay an annual accreditation fee of \$3000. The \$3000 accreditation fee also includes membership in the National Organization for Competency Assurance. Prior to seeking Commission accreditation, all organizations must either pay a \$500 non-refundable application fee or be members of NOCA.

Based on experience and the foregoing information about NCCA, DOT seeks comments on requiring NCCA certification as a requisite for addiction counselor certification

organizations wishing to have their certified counselors included in the SAP definition. DOT is proposing that the NCCA have the role as the accreditation organization because it has extensive experience in applying the only standards which are relevant in this circumstance.

Moreover, this proposal is pursued because the NCCA has evolved from the organization that developed the standards. It will be recalled that the predecessor organization-NCHCA-was established with help from the federal government to address circumstances such as this. The NCCA is presently fulfilling that role and, as a result, is uniquely qualified to support the Department's process of evaluating certifying organizations wishing to have their certified counselors included in the SAP definition.

The Department asks comment on the following regulatory text language that would implement this proposal.

Certification organizations wishing to have their certified drug and alcohol addiction counselors included in this part's definition of substance abuse professional (SAP, (see 49 CFR § 40.3) must obtain the National Commission for Certifying Agencies (NCCA) accreditation as a prerequisite for having the DOT review their petitions for inclusion into the SAP definition.

Because they have completed a stringent DOT review process, we do not contemplate that the two organizations (i.e., NAADAC and ICRC) whose certified addiction counselors are presently included in Part 40 would be affected by this requirement. We seek comment on whether this approach is appropriate or whether the two organizations should have to go through the NCCA process immediately, or within a few years. However, those organizations currently being reviewed by ODAPC would be required under this proposal to obtain NCCA accreditation. Reviews for those organizations currently in the review process will be placed "on hold" pending their NCCA accreditation.

The Department is currently preparing a comprehensive revision of 49 CFR part 40, its drug and alcohol testing procedures rule. We intend that the proposed rule to revise all of part 40 will address the subject matter of this ANPRM. After we review the comments on the ANPRM, we intend to incorporate the results of our review into the larger part 40 rulemaking project.

Regulatory Analyses and Notices

This advance notice of proposed rulemaking does not propose a significant rule for purposes of

Executive Order 12866 or the Department's regulatory policies and procedures. In terms of the Regulatory Flexibility Act, our preliminary conclusion is that the action on which the ANPRM seeks comment would not have a significant economic impact on a substantial number of small entities. This is because the entities that the proposal would affect are nationwide certifying organizations that are not small entities. The members of these organizations are primarily individuals, rather than entities. Because the proposal would make ODAPC's consideration of SAP certification organizations speedier and more efficient, many of the effects of the proposal would likely be positive. In any event, the Department requests comments on any small entity impacts the proposal might have.

There are no Federalism impacts sufficient to warrant a Federalism assessment. If the Department decides to include this item in the forthcoming overall part 40 NPRM, it may be viewed as involving an information collection requirement under the Paperwork Reduction Act (PRA). If so, consideration of any information collection burdens for this provision will be included in the PRA documentation for the part 40 NPRM. The authority for this ANPRM is the same as for the part 40 rulemaking in general (i.e., 49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 45101, *et seq.*).

List of Subjects in 49 CFR Part 40

Drug testing, alcohol testing, reporting and recordkeeping requirements, safety, transportation.

Issued this 10th day of May 1999, at Washington, D.C.

Rodney E. Slater,

Secretary of Transportation.

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